

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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JAN 17 1995
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
TELEPHONE COMPANY-)
CABLE TELEVISION)
Cross-Ownership Rules)
Section 63.54-63.58)
)
and)
)
Amendments of Parts 32, 36,)
61, 64, and 69 of the)
Commission's Rules to)
Establish and Implement)
Regulatory Procedures for)
Video Dialtone Service)

CC Docket No. 87-266

RM-8221

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**REPLY COMMENTS OF TIME WARNER CABLE IN
THE THIRD NOTICE OF PROPOSED RULEMAKING**

TIME WARNER CABLE

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Time Warner Cable ("TWC"), a Division of Time Warner Entertainment Company, L.P., hereby submits its Reply Comments in the above-captioned proceeding.

INTRODUCTION

With these Reply Comments, TWC responds to several of the commenting parties whose positions threaten the future competitive viability of broadband video delivery. TWC first opposes Liberty Cable Company, Inc.'s proposed scheme for the regulation of shared channel capacity because it undermines the basic regulatory framework the Commission has established for video dialtone ("VDT"). TWC next urges the Commission to allow market forces to determine the proper architecture for VDT networks and to resist requests to impose an all-digital

requirement. TWC also asks that market demand, rather than Commission or telco administered preferential access rules, determine the programming carried on VDT platforms. Finally, TWC registers its support for the pole attachment and conduit rules proposed by Continental Cablevision, Inc., et al. because they will help prevent the kind of discrimination TWC has itself suffered at the hands of GTE in Hawaii.

I. THE COMMISSION SHOULD REJECT LIBERTY CABLE'S PROPOSED SCHEME FOR THE REGULATION OF SHARED CHANNEL CAPACITY

In its comments, Liberty Cable Company, Inc. ("Liberty") asks the Commission to adopt a scheme for the regulation of VDT that combines elements of channel sharing as well as anchor programming. Under Liberty's plan, VDT providers would be permitted to select anchor programmers based on "objective criteria."¹ The anchor programmers would in turn be obligated to resell the programming on their shared channels at cost to other VDT programmers.²

Liberty's plan suffers from several fatal flaws. First, this is simply not the proper proceeding in which to try to revive the anchor programmer concept. The FCC has already rightly rejected proposals to allow VDT providers to allocate all or substantially all of their capacity to a single programmer. As the Commission stated in the Reconsideration Order,

¹ See Comments of Liberty Cable Company, Inc. at 3.

² See id. at 3-4.

We also reject requests that LECs be permitted to allocate all or substantially all analog capacity to a single "anchor programmer." These requests appear to be premised on the assumption that only analog capacity allows a viable alternative to cable service in the short-term. To grant these requests would thus be inconsistent with the common carrier model for video dialtone and our requirement that LECs offer sufficient capacity to accommodate multiple video programmers.³

Thus, Liberty may propose its plan in a petition for reconsideration or on judicial review. But Liberty may not raise this argument in the Third Further Notice of Proposed Rulemaking in which the Commission did not solicit comment on the issue.

Moreover, anchor programmer schemes suffer from other problems in addition to the capacity issue relied upon by the Commission. First, it is fundamental that VDT providers are prohibited from acting as programmers.⁴ Yet whenever VDT providers choose anchor programmers, they inevitably influence the selection of programming in violation of the programming prohibition. Furthermore, VDT providers are also prohibited from

³ Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, CC Docket No. 87-266, RM-8221 at ¶ 35 (rel. November 7, 1994) ("VDT Reconsideration Order").

⁴ See Telephone Company-Cable Television Cross-Ownership Rules Sections 63.54-63.58, CC Docket No. 87-266, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781 at ¶ 14 (1992) (VDT providers "will not be able to: (1) select video programming by determining how programming is presented for sale to consumers, including making decisions concerning the bundling or "tiering" or the price, terms and conditions of video programming offered to consumers . . .").

discriminating among programmers.⁵ Indeed, the "essence" of common carrier VDT service "is an obligation to provide service indifferently to all comers."⁶ Allowing anchor programmers to select programmers for carriage based on any subjective criteria (and anchor programmers would serve no purpose if they did not somehow discriminate) subverts this basic common carrier principle.

Furthermore, as NCTA has cogently argued, telco-administered channel sharing arrangements such as the one Liberty proposes suffer from the same defects as anchor programming schemes.⁷ Shared channels are, after all, simply another form of program packaging. Thus, if the FCC allows the VDT provider to choose the packager for the shared channel capacity, as Liberty urges, then the telco becomes involved in unauthorized programming. Moreover, as with anchor programming, channel sharing results in granting certain programmers privileged access to the common carrier platform in violation of the nondiscrimination principles of VDT.⁸

⁵ See id. at ¶ 57 (VDT providers "will be required to make available to all service providers the same service offerings and functionalities on the same terms and conditions").

⁶ National Cable Television Assoc. v. FCC, 33 F.3d 66, 75 (D.C. Cir. 1994).

⁷ See Comments of National Cable Television Association, Inc. at 15-18.

⁸ TWC's experience with NYNEX illustrates the destructive effects of granting a single packager privileged access to VDT. NYNEX had originally intended that Liberty, one of TWC's
(continued...)

II. THE COMMISSION SHOULD NOT MANDATE A SPECIFIC ARCHITECTURE FOR VDT SYSTEMS.

TWC believes, like almost all of the parties commenting in this proceeding, that the Commission should not require the deployment of all-digital VDT networks. Rather, the Commission should permit VDT providers to design their networks based on the needs of the market.

The FCC should be especially wary of comments such as those filed by BroadBand Technologies, Inc. ("BroadBand").⁹ BroadBand developed Fiber Loop Access ("FLX") architecture, a fiber-to-the-curb system that delivers all-digital video service. It is therefore not surprising that BroadBand urges the FCC to mandate that VDT networks be all-digital. It should give the Commission pause, however, that, despite BroadBand's statements regarding the broad acceptance of FLX, the telcos all ask the Commission not to impose an all-digital requirement on VDT.¹⁰ The

⁸(...continued)
competitors in the video distribution business in New York City, would act as an anchor programmer in its VDT trial in New York City. Although the FCC conditioned its grant of authority to conduct the test upon, inter alia, NYNEX granting all programmers open, non-discriminatory access to the VDT platform, NYNEX nevertheless has disadvantaged TWC, has granted Liberty privileged access to its VDT platform, and Liberty has in turn disadvantaged TWC. TWC believes that virtually any anchor programming or channel sharing arrangement would result in the same kind of discrimination TWC has experienced.

⁹ See Comments of BroadBand Technologies, Inc. on The Third Further Notice of Proposed Rulemaking ("BroadBand Comments").

¹⁰ See Comments Of The Pacific Telesis Group, Pacific Bell And Nevada Bell at 2-4; Comments of GTE at 3-5; Comments of NYNEX (continued...)

Commission should remain neutral and not opt for a particular technology model for VDT.

Nor should the Commission be swayed by BroadBand's repeated assertion that permitting telcos to build coaxial-fiber hybrid systems will lead to future resistance to upgrades.¹¹ If the telcos can gain a future competitive advantage over TWC and other cable operators by building all-digital, fiber-to-the-curb networks, they will most certainly do so. Indeed, as BroadBand points out, Bell Atlantic has already begun testing the demand for this kind of technology.¹² But it should be left to the telcos, guided by marketplace experiments in the provision of all-digital VDT services, to decide whether fiber-to-the-curb deserves widespread adoption.

Finally, the Commission should not take BroadBand's as the final word on the relative cost of digital set-top converter boxes. BroadBand asserts that the cost of digital boxes will

¹⁰(...continued)
at 9-10; Comments of U S WEST Communications, Inc. at 9-10; Comments of Ameritech On Third Further Notice of Proposed Rulemaking at 1-3; Comments of BellSouth at 1-4; Southwestern Bell Corporation's Initial Comments On Memorandum Opinion And Order On Reconsideration And Third Further Notice of Proposed Rulemaking at 3-4; Comments of Bell Atlantic on Third Notice of Proposed Rulemaking ("Comments of Bell Atlantic") at 2-8.

¹¹ See e.g., BroadBand Comments at 7 ("LECs that opt for analog video systems today may legitimately be able to argue in the future that it would not be economically reasonable for them to incur the costs of expanding the capacity of such networks").

¹² See Comments of Bell Atlantic at 4-5 (describing its fiber to the curb network in Loudoun County, Virginia as well as its plans for a similar network for Dover Township, New Jersey).

drop over time as the market matures.¹³ But that is of course true of all set-top converter boxes regardless of whether they are digital, analog or hybrid.

**III. THE COMMISSION SHOULD NEITHER MANDATE NOR PERMIT
PREFERENTIAL TREATMENT FOR ANY CLASS OF PROGRAMMERS**

TWC opposes preferential access to VDT for certain programmers, whether mandated by the Commission or voluntarily implemented by VDT providers, because it would violate Title II of the Communications Act. In addition, FCC mandated preferential access rules would violate the First Amendment.

Preferential access violates the fundamental tenets of the VDT common carrier model. First, preferential access will involve VDT providers in the "selection and distribution of video programming" which the FCC and the D.C. Circuit agree a common carrier may not do.¹⁴ Furthermore, preferential access would reduce the capacity available for program packagers and thus would likely subvert the common carrier obligation to provide service to all who make "reasonable request therefor."¹⁵ Finally, preferential access would result in non-preferred programmers subsidizing preferred programmers in violation of the

¹³ BroadBand Comments at 19.

¹⁴ See Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58 Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 5069, 5071; National Cable Television Ass'n v FCC, 33 F.3d 66, 71, 74 (D.C. Cir. 1994).

¹⁵ See 47 U.S.C. § 201(a).

requirement that common carriers ensure that charges are "just and reasonable."¹⁶

Moreover, FCC-mandated preferential access would involve the Commission in the regulation of programmers' speech. Such a scheme would be unlikely to pass First Amendment muster.

IV. THE COMMISSION SHOULD PROHIBIT VDT PROVIDERS FROM USING THEIR POLE OR CONDUIT SPACE IN AN ANTI-COMPETITIVE MANNER

The telephone companies' incentive to discriminate against cable providers in the provision of pole or conduit space has increased enormously over the past several years. VDT promises to bring telcos into competition with cable companies in the provision of broadband video services. Meanwhile, telephone companies are trying to fend off attempts by cable companies to enter the local telephone business. These developments have made it especially important for the Commission to ensure that telcos do not use their control over essential pole and conduit space to discriminate against their competitors.

As the Commission knows, TWC has suffered from egregious acts of discrimination by GTE just at the time when GTE plans to provide VDT service in competition with TWC's cable business in Hawaii and TWC's sister partnership seeks to enter GTE's local telephone business in Hawaii.¹⁷ On November 30, 1994, TWC filed

¹⁶ See 47 U.S.C. § 201(b).


¹⁷ Time Warner Communications of Hawaii, L.P. d/b/a Oceanic Communications is the sister partnership. Time Warner Entertainment Company owns a 99 percent limited partnership interest in Oceanic Communications.

a complaint pursuant to Section 224 of the Communications Act of 1934, 47 U.S.C. § 224, for relief from GTE's discriminatory treatment.¹⁸ That matter is currently pending before the Commission. TWC incorporates by reference the assertions made in that complaint. Moreover, in light of GTE's actions, TWC is convinced that the Commission should adopt rules restricting VDT providers' ability to discriminate against their competitors' access to pole and conduit space. TWC therefore urges the Commission to adopt the recommendations of Continental Cablevision et al. as set forth in their comments.¹⁹

CONCLUSION

For these Reasons, TWC respectfully recommends that the Commission adopt VDT rules consistent with the recommendations contained herein.

Respectfully submitted,
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¹⁸ See Attachment And Duct Rental Rates Complaint, filed December 11, 1994 in Time Warner Cable d/b/a Oceanic Cable v. GTE Hawaiian Telephone, PA 95-005.

¹⁹ See Pole Attachment Comments of Continental Cablevision, Inc., et al. at 29-38.

CERTIFICATE OF SERVICE

I, Thomas Jones, do hereby certify that on this 17th day of January, 1995, copies of the foregoing "Reply Comments of Time Warner Cable in the Third Notice of Proposed Rulemaking" were delivered by first-class, postage pre-paid mail to the following parties:

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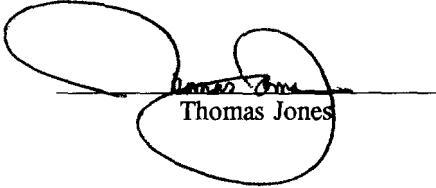
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